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IN THE

Supreme Court of the United States

October Term, 1962

No. 217

JOSEPHINE GOSS, *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondent City of Knoxville urges that the racial transfer provisions "are under review here only as transition measures" (Knoxville Br. 3). Referring to "disorders . . . occurring in a community only eighteen miles from Knoxville . . . " it argues that "In Knoxville only in rare instances will white parents permit their children to go to predominantly Negro schools, and the majority of Negro parents won't let their children go to predominantly white schools" (Knoxville Br. 4). Knoxville argues also that "there is an assumption," which it calls valid, "that requests for transfer based upon race are supported by actual good cause which stems from race" (*Id.* at 5). But the Board concedes it could make transfer following individual evaluations under Paragraph 5 of its plan, which covers "all cases, including those of handicap due to race" (*Id.* at 6). While

Knoxville concedes such individuation is possible in the case now before the Court, the city urges that other communities may not be able to manage it; therefore, Knoxville also should be able to use race as a gross factor in justifying transfers (*Id.* at 6).

Respondent Davidson County Board of Education principally makes the argument[1] that "the Fourteenth Amendment did not guarantee the students an integrated school to attend; and any segregation was not the result of the plan but of individual choices of individual students" (Davidson County Br. 11-12). *Amicus curiae* Chattanooga and Memphis School Boards make the same argument (Chattanooga Br. 3, *et seq.*; Memphis Br. 5, *et seq.*).

The Racial Transfer Features Are of Indefinite Duration.

In reply, petitioners submit first that the racial transfer provision is not casually incidental to the desegregation plan, but is as permanent as any other feature of school administration in the respondent communities. Moreover, the option is an unconstitutional racial discrimination and perpetuates the segregated system.

There is no evidence whatsoever in the record that either racial transfer provision is temporary or designed to operate only during a period of transition—although if this were true their invalidity would be nonetheless obvious. Notably, no party or *amicus* (including the United States which condemns the transfer provision but views it as temporary) (United States' Br. 18) cites anywhere to the record to demonstrate that the option is temporary. Of course, all equity decrees under continuing jurisdiction may be called temporary in the sense that they may be modified; but modifications must be related to unforeseen

[1] This Respondent here relied on the dissent in *Dillard v. School Board of the City of Charlottesville*, 308 F. 2d 920 (4th Cir. 1962).

changes in conditions. *United States* v. *Swift & Co.*, 286 U. S. 106. All policies and practices of school boards are subject to change. Perhaps the transfer provision was assumed to be transitional because it was coupled to a twelve-year desegregation plan. But under this view coalescence of the Negro and white zones (R. 52, 214) might also be called temporary. And other features, obviously of a permanent nature, also might be termed transitional, e.g., paragraphs 5 of the Knoxville and 4 of the Davidson County plans (transfers may be allowed for "good cause") (R. 52-53, 214), 6 of Davidson County plan (pupil registration to be held in the spring) and 7 of Davidson (transportation to be furnished to eligible students) (R. 215). None of these, however, may be assumed to terminate at any time in the foreseeable future, and on their face are permanent. There is no reason to assume that the racial transfer features are limited in a way that these are not.

Indeed, the racial feature should be read in the light of Respondents' proven desire to accomplish no more desegregation than compelled to. Knoxville's Answer asserts that so far as *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294, is concerned "The decisions of that [this] Court are never unchangeable, and a different membership in the future may order differently . . . [although] there does not now exist reasonable support for the proposition" that this will occur "within the foreseeable future" (R. 27). Knoxville has asserted a desire to perpetuate segregation "indefinitely" (R. 79-80) and features of its plan which retain segregation should be read in that light. Davidson County similarly made no effort to fulfill

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[2] The Knoxville supervisor of child personnel testified that the racial transfer provisions would merely add an additional ground for transfer to the system theretofore employed for 23 years (R. 117); he nowhere suggested that this addition was temporary.

its constitutional duty to desegregate until specifically compelled by judicial decree.

It is more reasonable to assume on these records that these respondents would like to retain as much segregation as they can for as long as they can, and the plans, therefore, do not permit bare assumptions that their racial features will disappear at some indeterminate time in the future. On this record, the inescapable conclusion is that after the grade-a-year features of the plan have been exhausted, the transfer provisions will remain on the books unless expressly repealed or invalidated by judicial decree.

The Racial Option Plans Are Unconstitutional State Action Whether Temporary or Not.

The racial option is based on an "assumption" (Knoxville Br. 5) "that requests for transfers based upon race are supported by actual good cause which stems from race" (*Ibid.*). Knoxville refers to "common knowledge" that embarrassment, harm and handicap flow from desegregation. The Davidson County brief (p. 7) refers to a desire to transfer "to avoid a radical departure from custom; or the fear of student friction. . . ." Both of these plans, in actual application, allow "paper" transfers, that is, pupils simply choose their schools on the basis of race before going to any school (R. 141, 219-226). Therefore, neither plan requires transfers on the basis of the experience of individual children but, *a priori*, each allows an option as to whether one desires to be desegregated or not.

This is, of course, contrary to the principal assertion of respondents' briefs, state action in a number of senses. (1) It is a complex of private and state conduct in the nature of such a combination condemned in *N. A. A. C. P. v. Alabama*, 357 U. S. 449. (2) Moreover, by rule of the

State, a Negro child is denied the right to transfer in a situation wherein a white child explicitly has that right and vice versa. This seems to fly in the face of the most elementary reading of *Brown* v. *Board of Education*, 347 U. S. 483. If children may not be assigned on the basis of race, why should they be permitted to transfer on this basis?

But beyond this, and far more invidious, is (3) the fact that the plans so structure the school systems as to perpetuate segregation for as long as possible (R. 104, 108, 226, 277). Thus, this Court's admonition that school districts are to act as promptly as possible to convert from *systems* of segregation to "*systems*" (*Brown* v. *Board of Education*, 347 U. S. 483, 494; 349 U. S. 294, 300; *Cooper* v. *Aaron*, 358 U. S. 115), of nonsegregation is thwarted by a standard of system-wide application designed to perpetuate segregation to the greatest degree possible while affording token compliance stretched out over a long period of time.

Petitioners certainly do not contend that if an individual child has proven difficulties in a particular educational situation, the school officials may not do whatever is necessary to alleviate his personal difficulties. But petitioners submit that seldom, if ever, should such a child be permitted transfer on a racial basis. Certainly at the very least all other reasonable avenues of approach to the problem should be exhausted before, even in an individual case, school authorities may consider race.

Racial distinctions between citizens "are by their very nature odious to a free people", *Hirabayashi* v. *United States*, 320 U. S. 81, 100, and are constitutionally suspect, *Korematsu* v. *United States*, 323 U. S. 214, 216; cf. *Bolling* v. *Sharpe*, 347 U. S. 497. One of the principal impediments

to effectuating the decision of this Court in *Brown* v. *Board of Education*, *supra*, has been that resistance has taken the form not so much of outright defiance as of perpetuation of segregation under forms nominally unrelated to race.

Indeed, Knoxville argues in substance, and in advance of investigation of particular cases, that if it were permitted to transfer children on an individual basis because of objections to racial desegregation, the end result would be essentially what it seeks to accomplish under the racial option transfer provision (Knoxville Br. 6). This is a particularly dangerous prospect for law enforcement when, as in Knoxville, "The Board's serious, frank deliberations on the subject of desegregation were not in the formal open meetings" (R. 59).

Therefore, while no rule of law can entirely guard against decisions which express unstated privately arrived at considerations, any rule which encourages or even allows considerations of race greatly expands the opportunity to maintain segregation under other labels. The deliberate speed formula allowed time for the solution of specified administrative problems and other problems in like categories. It explicitly excluded hostility to desegregation as ground for delay, but because of its generality it could not prevent its being used as it was in Knoxville and Davidson County as a basis for doing nothing until a court order were entered against the defendants. To the extent that the deliberate speed concept, as one resting essentially on administrative considerations, were to be loosened to allow for "transitional problems of personal adjustment . . . even when they originate in customs fixed by race" (Brief for United States as *Amicus Curiae* 25; Knoxville Br. 3) it will offer additional ammunition to those forces in communities which want to do nothing, even though there also exist in those communities forces which desire

to comply with the Constitution. To the extent that the compliance formula is tightened to eliminate any express racial consideration, it will strengthen the hand of those who desire to do their constitutional duty.

Respectfully submitted,

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